UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/AC.154/307
21 March 1997

ORIGINAL: ENGLISH

COMMITTEE ON RELATIONS WITH
THE HOST COUNTRY

LETTER DATED 21 MARCH 1997 FROM THE CHAIRMAN OF THE COMMITTEE ON RELATIONS WITH THE HOST COUNTRY ADDRESSED TO THE MEMBERS OF THE COMMITTEE

Please find attached the legal opinion of the Legal Counsel of the United Nations regarding a New York City Diplomatic Parking Programme. The opinion was requested by the Host Country Committee at its 181st meeting, held on 10 March 1997.

It is being circulated by the Secretariat as an official document of the Committee.

(Signed) Nicos AGATHOCLEOUS

97-07720 (E) 240397

/...

Annex

NEW YORK CITY DIPLOMATIC PARKING PROGRAMME

Note by the Legal Counsel dated 20 March 1997

I. INTRODUCTION

1. At the 181st meeting of the Committee on Relations with the Host Country, held on 10 March 1997, Mr. Randy Mastro, Deputy Mayor of the City of New York, participating in the meeting as observer at the request of the United States delegation, introduced to the Committee a New York City Diplomatic Parking Programme (hereinafter "the City Programme" or "the Programme"), subsequently issued as Committee document A/AC.154/305 dated 14 March 1997. After deliberations on the Programme, in which almost all members of the Committee participated, the Committee requested, by consensus, the Legal Counsel to give a legal opinion on the City Programme.

2. The United States Mission drew the attention of permanent missions and of the Secretariat to the specific components of the Programme by a circular note verbale No. HC-17-97 dated 14 March 1997, issued at the request of the host country as Committee document A/AC.154/306 dated 14 March 1997.

3. The Programme is intended to apply to motor vehicles bearing federal licence plates in the "D", "A", and "C" series (A/AC.154/305, para. 1; A/AC.154/306, annex, para. (a)). The "D" licence plates are issued to the members of the diplomatic staff of the permanent missions accredited to the Organization. The "A" licence plates are issued to the United Nations Secretariat, including the motor vehicles of a limited number of senior officials of the Organization entitled to diplomatic status in the host country.

4. The "C" licence plates are issued to the Consular Corps and are also covered by the Programme. However, as consular posts are established on a bilateral basis, they do not concern the Organization. Consequently, they are not dealt with in the present legal opinion.

5. The Programme also indicates (A/AC.154/305, para. 1; A/AC.154/306, annex, para. (a)) that motor vehicles with "S" licence plates "will remain subject to the full range of New York City parking enforcement measures", i.e. that the substantive provisions of the Programme do not apply to them. These licences are issued to the members of the non-diplomatic staff of permanent missions.

II. INTERNATIONAL LAW ON PRIVILEGES AND IMMUNITIES

6. In the United States, the legal status of permanent missions of Member States and their personnel, and of the United Nations and its personnel, and the scope of their privileges, immunities, exemptions and facilities are governed, in various degrees of detail, by Articles 104 and 105 of the Charter of the United Nations, the 1946 Convention on the Privileges and Immunities of the United Nations (the so-called "General Convention"),[1] the 1947 Headquarters Agreement between the United Nations and the United States,[2] as well as by

provisions of the 1961 Vienna Convention on Diplomatic Relations' that are applicable mutatis mutandis.

A. Charter of the United Nations

7. According to Article 105 (1) of the Charter of the United Nations "[t]he Organization shall enjoy in the territory of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." Furthermore, pursuant to Article 105 (2), "[r]epresentatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with Organization." The detailed application of these general principles is, pursuant to Article 105 (3) of the Charter, effected through the 1946 Convention, to which the United States became a party in 1970, and, in the particular case of the host country, also through the Headquarters Agreement.

B. 1946 Convention on the Privileges and Immunities of the United Nations

8. The privileges and immunities of representatives of Member States are set out in article IV of the 1946 Convention. They are entitled, inter alia, to immunity from legal process of every kind in respect of words spoken or written and all acts done by them in their capacity as representatives (section 11 (a)) and to such other privileges, immunities and facilities "as diplomatic envoys enjoy" (section 11 (g)).

9. The United Nations, its property, funds and assets enjoy immunity from every form of legal process under article II of the 1946 Convention (section 2). Furthermore, the property of the Organization "shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action" (section 3).

10. In addition to the functional immunities and privileges of all officials of the Organization specified in article V, section 18, the Secretary-General and all Assistant Secretaries-General (now Under-Secretaries-General and Assistant Secretaries-General) are entitled to "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law" (section 19).

11. Under the final article of the 1946 Convention, the Member States parties thereto are expected to be in a position under their own law to give effect to its terms (section 34).

C. 1947 Headquarters Agreement

12. Section 15 of the Headquarters Agreement specifies:

"(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary;

"(2) such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned;

"...

"shall, whether residing inside or outside the Headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it."

13. As stated in paragraph 13 of a note dated 17 June 1983 addressed to the Host County Committee by the Legal Counsel setting out the views of the Organization concerning the applicability of section 205 of the United States Foreign Missions Act to the missions accredited to the United Nations, "[i]t follows from article V, section 15, of the Headquarters Agreement that the relevant provisions of general international law on the question of privileges and immunities also apply to the resident representatives to the United Nations and their staffs."[4]

14. Finally, section 27 of the Headquarters Agreement requires that it be construed "in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently, to discharge its responsibilities and fulfil its purposes."

D. 1961 Vienna Convention on Diplomatic Relations

15. The contemporary principles, norms and rules governing diplomatic privileges and immunities are codified in greater detail in the 1961 Vienna Convention on Diplomatic Relations, to which the United States is a party.

16. As stated in the above-mentioned note by my predecessor, "the concept of diplomatic privileges and immunities embodied in the Vienna Convention sets forth, inter alia, the rights and duties of a receiving or host State".[5] I would like to add to this stipulation that, by the very same concept, rights and duties are also established for the sending States and for members of the staffs of their missions. By the same token, certain rights and duties under the Vienna Convention apply mutatis mutandis to the United Nations, although the Organization is not a party to that instrument.

17. Article 41(1) of the Vienna Convention unequivocally provides that "it is the duty of all persons enjoying such [diplomatic] privileges and immunities to respect the laws and regulations of the receiving State." The Convention,

however, indicates that this duty is "without prejudice" to the privileges and immunities of diplomatic agents.

18. The receiving State, in this case the host State, is, under article 25 of the Vienna Convention, obliged to accord to foreign diplomatic missions full facilities for the performance of their functions. The legislative history of this provision, as reflected in the report of the International Law Commission on the draft articles on diplomatic intercourse and immunities, indicates that "the receiving State (which has an interest in the mission being able to perform its functions satisfactorily) is obliged to furnish all the assistance required, and is under a general duty to make every effort to provide the mission with all facilities for the purpose."[6] It is to be recalled that in his above-mentioned note, the Legal Counsel took the position that "[t]he concept of diplomatic privileges and immunities embodied in the Vienna Convention ... [foresees] among these duties ... the obligation to provide every assistance to foreign diplomatic missions for the performance of their functions ..."[7]

19. Article 22(3) of the Vienna Convention specifically provides that "means of transport of the mission shall be immune from search, requisition, attachment or execution." These immunities constitute elements of the notion of inviolability. Furthermore, in accordance with article 30(2) of the Convention, the property of a diplomatic agent shall enjoy inviolability. The legislative history of the latter provision indicates that the drafters of the Convention were of the view that "so far as movable property is concerned ... the inviolability primarily refers to goods in the diplomatic agent's private residence; but it also covers other property such as his motor car ..."[8]

20. Most importantly, article 31(1) of the Vienna Convention provides that a diplomatic agent shall enjoy immunity from the criminal, civil and administrative jurisdiction of the host State. While immunity from criminal jurisdiction is complete, immunity from civil and administrative jurisdiction is subject to exceptions which are not relevant to the present analysis. However, it should be noted that the Convention prescribes that a diplomatic agent "is not obliged to give evidence as a witness" (article 31(2)), and "no measures of execution may be taken in respect of a diplomatic agent" (article 31(3)).

III. BENEFITS AND ADVANTAGES OF THE CITY PROGRAMME

21. In my view, certain new facilities envisaged by the proposed Programme are responsive to the concerns of the diplomatic community. Thus, it would appear that all unsatisfied outstanding tickets for parking violations issued to members of the diplomatic community before the start of the Programme (with the exception of those referred to in paragraph 33 below) are no longer to be taken into account. The City is to assume an obligation to ensure that each mission has two parking spaces and one allocated for the residence of the Permanent Representative (A/AC.154/305, para. 2; A/AC.154/306, annex, para. (b)). The New York Police Department is to establish a telephone "hot line" for missions to report unauthorized vehicles parked in their diplomatic parking areas, and these unauthorized vehicles would be subject to towing (A/AC.154/305, para. 4; A/AC.154/306, annex, para. (d)). The New York City Department of Finance is to provide each mission with a monthly computerized report of all parking tickets issued to its diplomatic vehicles, indicating which tickets remain outstanding

(A/AC.154/305, para. 6; A/AC.154/306, annex, para. (f)). An officer of the New York City Department of Finance is to be designated to deal exclusively with tickets pertaining to the diplomatic community (A/AC.154/305, para. 7; A/AC.154/306, annex, para. (g)). Finally, the United States Mission is to arrange a series of orientation sessions to clarify the Programme as well as the responsibilities of permanent missions thereunder (A/AC.154/305, para. 12; A/AC.154/306, fourth para.).

IV. ASPECTS OF THE CITY PROGRAMME HAVING LEGAL IMPLICATIONS

A. Elements of the Programme consistent with international law

22. The host country authorities, at the federal, state and municipal levels, have the right and the authority to establish the laws and regulations governing the use of diplomatic vehicles, parking and related matters. Such laws and regulations in any country are aimed at ensuring public safety and fair access to parking for all without discrimination, minimizing congestion and the like.

23. It is my considered opinion that, in accordance with the pertinent provisions of the 1946 Convention, the Headquarters Agreement and the 1961 Vienna Convention, diplomatic persons should, as a matter of principle, proper conduct and the good will traditionally demonstrated by the Diplomatic Corps, diligently and scrupulously observe the laws and regulations of the host State, including those pertaining to the operation of motor vehicles, parking and related matters. Non-observance of such laws and regulations reflects badly on the entire diplomatic community and on the Organization itself. The entitlement to diplomatic privileges, immunities and exemptions must not be perceived as indulgence to disregard the laws and regulations of the host country. Compliance by the diplomatic community with the traffic laws and regulations to which the general public is subject, helps to promote the image of diplomats as law-abiding individuals, and of the United Nations itself as an organization whose purposes encompass the development of friendly relations and respect for law.

24. Flagrant parking violations are incompatible with the intent of the applicable legal instruments as well as with the above-stated purposes of the Organization. Such behaviour is not acceptable for members of the Diplomatic Corps, the overwhelming majority of whom traditionally maintain high respect for local laws. At no time should entitlement to diplomatic privileges and immunities, exemptions and facilities be perceived as permission to disregard or violate the laws and regulations of the host country.

25. Ticketing of diplomatic cars parked in violation of the applicable laws and regulations (cf. A/AC.154/305, para. 3; A/AC.154/306, annex, para. (c)) is not by itself objectionable under international law and is intended to notify the driver of such violations. However, such tickets must be justifiable, non-discriminatory and in full compliance with all laws and regulations. Any irregularities in this respect tend to undermine the credibility of the system and put those who desire to abide by it strictly in a difficult, if not impossible, position.

26. Furthermore, the payment, on a voluntary basis, by members of the diplomatic community of fines for traffic and parking violations should not be considered as constituting a waiver of their privileges and immunities, exemptions and entitlement under the applicable Agreements, but rather as fulfilment of the obligation to comply with applicable laws. The routine payment of such fines by diplomats is the custom in most countries, and especially in cities where the headquarters of international organizations are located.

27. The towing of a diplomatic vehicle when parked in a manner creating a public hazard, causing a serious obstruction or jeopardizing the public health and safety, such as parking by a fire hydrant (see A/AC.154/305, para. 10; A/AC.154/306, annex, para. (j)), may be necessary to safeguard health and safety and is not per se objectionable. As a practical matter, it may be necessary to tow a car to a place of safe keeping, and this too is not legally objectionable. However, as indicated in paragraph 30 below, a diplomatic car towed to a place of safe keeping must be made available at any time it is reclaimed, and the payment of a fine or charge cannot be made a precondition for its recovery.

28. The proposed procedure of challenging parking tickets on the ground that they may have been improperly issued (A/AC.154/305, para. 7; A/AC.154/306, annex, para. (g)) affords a possibility for the persons and the missions concerned to informally dispose of any such tickets that may have been issued improperly before they are included in any compilation of outstanding tickets (A/AC.154/305, para. 6; A/AC.154/306, annex, para. (f)). In particular, this system should protect those concerned from having to make unnecessary payments. As long as resort to such procedure is entirely voluntary and does not result in any compulsory element of enforcement (see paras. 30 and 31 below), it should be considered legally unobjectionable, as would also be true of any similarly constituted second level of review.

B. Elements of the Programme which appear not to be in full compliance with international law

29. The laws and regulations of the host country pertaining to the operation of diplomatic motor vehicles, parking and related matters should be consonant with its obligations assumed under international legal instruments. Regrettably, certain components of the proposed Programme may not be in full compliance with such obligations.

30. For example, removal of licence plates from vehicles towed to a place of safe keeping, and non-release of a diplomatic vehicle for operation until certain conditions are met, such as payment of a fine and/or a charge for its towing or safe keeping (see A/AC.154/305, paras. 5 and 9; A/AC.154/306, annex, paras. (e) and (i)), would appear to be enforcement measures and amount to an exercise of jurisdiction and, therefore, inconsistent with article 31 of the Vienna Convention, articles IV and V of the 1946 Convention and article V of the Headquarters Agreement.

31. In general, measures aimed at depriving a diplomatic agent of the right to drive by withdrawal of licence plates, registration or other pertinent legal documents (A/AC.154/305, para. 10; A/AC.154/306, annex, para. (j)) are

tantamount to an exercise of jurisdiction of the host country and thus are in contravention of the relevant provisions of article 31 of the Vienna Convention, articles IV and V of the General Convention and article V of the Headquarters Agreement. More importantly, they would be inconsistent with the host country's obligation to facilitate the functioning of the missions accredited to the United Nations and of their members.

32. The fact that the host country cannot under international law take all the measures envisaged in the Programme should, however, not create the impression that there are no means of addressing a situation of a diplomat accredited to an international organization failing to obey local laws.

33. Finally, the provision of the Programme envisaging a special regime concerning any diplomatic vehicle having received any tickets for parking by a fire hydrant during the period from 1 January 1997 to the start of the Programme (A/AC.154/305, para. 10; A/AC.154/306, annex, para. (j)) evidently has a retrospective element. The retroactive application of a new regime would not be consonant with general principles of law. Under any circumstances, as indicated in paragraphs 30 and 31 above, the measures contemplated in these cases would appear to be inconsistent with international law.

V. CONCLUSION

34. Generally the elements of the City Programme are clearly within the scope of the host country's power to establish the laws and regulations governing the operation and parking of diplomatic vehicles and related matters and do not seem to raise objections under international law; parts of the Programme should even be welcomed as likely to reduce the current difficulty of diplomatic missions in securing parking and in voiding unjustified tickets. However, as identified above, certain provisions of the Programme do not appear to be consistent with international law.

Notes

[1] United Nations, Treaty Series, vol. 1, p. 15.

[2] Ibid., vol. 11, p. 11.

[3] Ibid., vol. 500, p. 95.

[4] Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 26 (A/38/26), annex I, para. 13.

[5] Ibid.

[6] Yearbook of the International Law Commission, 1958, vol. II, p. 96, paragraph (2) of the commentary to article 23, "Facilities".

[7] Op. cit.

[8] Yearbook ... 1958, vol. II, p. 98, paragraph (3) of the commentary to article 28, "Inviolability of residence and property".